Midland Oil and Gas Task Force
Recommendations
May 26, 2009

Introduction

The Midland Oil and Gas Task Force was charged with reviewing the existing City of Midland ordinance regulating oil and gas drilling and production activities within the city limits (Midland City Code 6-1-2), and providing recommendations to the City Council with respect to how the ordinance might be modified to meet the goals of encouraging orderly development and growth of the city while accommodating the rights of mineral owners to reasonable access to their minerals and protecting the health, welfare and safety of the public. In connection with this charge, the Task Force was asked to examine the current ordinance, explore current issues relating to mineral and surface development, research the methods by which other cities manage this issue, and recommend an equitable process by which the two goals can be accommodated.

The Task Force has met with the City's Director of Planning, the City Attorney, the City Fire Marshal, and the City's outside counsel. It has heard presentations from both oil and gas developers and real estate developers relating to the process by which these developments are undertaken and completed. It has toured ongoing real estate developments and drilling oil and gas wells. It has had two public meetings to hear from interested citizens and has solicited written comments from other interested parties.

Findings

The Task Force has made the following findings:

1, The existing oil and gas drilling ordinance and subdivision ordinance need to be modified if the City is to be in the best position to meet the twin goals of encouraging the orderly development and growth of the City and accommodating the rights of mineral owners to reasonable access to their minerals. In addition, the City should undertake development regulation in the first one-half mile of its extraterritorial jurisdiction to the extent that such regulation is permissible under the provisions of Texas law. Further, any voluntary annexation proposed by a surface owner should be conditioned upon agreement between surface and mineral owners upon drillsites to be located within the annexed area. Based upon the opinions expressed by the City's outside counsel, it is the sense of the Task Force that if the City arbitrarily denies reasonable access to a mineral owner's mineral estate, that denial could expose the City to substantial liability. For this reason, we believe that well defined procedures and requirements should be put in place by the City, implemented by City Staff, the Oil and Gas Subcommittee proposed in paragraph 8 below, and the Planning and Zoning Commission, and that consideration and approval of drilling permits by the City Council based upon the recommendation of the Planning and Zoning Commission should follow as a matter of course. It is counterproductive,

inefficient, and risks unnecessary liability if the City Council is put in the position of debating and acting on the details of each permit application that comes before it, and if the process is adequately addressed by City Staff, the Oil and Gas Subcommittee, and the Planning and Zoning Commission, then the City Council should be able to act on the application without having to assume the role of referee among the parties.

2. Without appropriate regulation, unrestricted oil and gas development would threaten the ability of the City to grow, and would impair the substantial investment that the city has made in extending city infrastructure to areas where future growth is anticipated. Conversely, arbitrarily restricting oil and gas development for purely aesthetic reasons impairs the right of a mineral owner to reasonable access to his minerals and deprives the City of substantial tax revenues.

3. It is the belief of the Task Force that oil and gas drilling and surface development should be treated differently depending upon whether it is occurring within areas that are already substantially developed, or in areas which have not yet been developed. Construction of buildings near existing wells raises fewer issues than the drilling of wells near existing occupied structures, and so the distance limitations for the former should be based upon safety considerations relating to a producing well. In the latter situation, distance limitations should be based upon safety considerations for a drilling well as well as a producing well, and in addition should take into consideration issues relating to noise, light, and traffic near the existing structures.

4. The current regulatory structure places an undue burden on real estate development. The platting process requires the expenditure of significant amounts of time and money, and the investments may be jeopardized by applications for oil and gas permits which are filed late in the real estate development process.

5. It will be in the City's best interest if oil and gas developers and real estate developers are required to work together, as early in the process as possible, to reach reasonable agreement with respect to accommodating one another's activities.

6. With respect to an area which has not yet been developed for oil and gas or real estate, in the event that the oil and gas developer and the real estate developer are unable to reach agreement with respect to a plan to accommodate both activities, then the City should impose reasonable requirements on each party which assure that both parties' interests are accommodated. It is the sense of the Task Force that in the absence of agreement otherwise, the City should impose one drillsite for each eighty acres within a section, giving due consideration to placing such locations in a manner which will (a) give reasonable accommodation to surface development, and (b) accommodate the City's long range plan. Each drillsite imposed by the City should be comprised of approximately two to two and one-half acres, depending upon individual circumstances, as recommended by the Oil and Gas Subcommittee described in paragraph 8 below. The City's mechanism for imposing the drillsite would be to deny approval of a plat for either oil and gas

development or real estate development without the inclusion of the drillsite on the plat, and to deny a drilling permit for a location which has not been platted as a drillsite. As set forth in subparagraphs 7.C. and 7.D. below, each owner would be required to either (a) work out an agreement with the other owner, or (b) work with city staff to arrive at a drillsite location which reasonably accommodates the needs of the other owner.

7. The City's Subdivision Regulations should be amended to:

A. Require that a well permit be subject to a planning and platting process to determine the location of the drillsite, and the applicant's contribution to infrastructure construction consistent with the demands that the well location will place on city facilities and surface development and consistent with state law.

B. Require that the applicant for an oil and gas drilling permit or for surface development of a tract in excess of 2.5 acres, whichever is first in time, be required to notify and work with the owner of the other estate in order to reach agreement on how to accommodate the two uses. For notification purposes, in the event that the mineral estate is owned by more than one owner, the surface owner should be deemed to have met the notification requirement if he notifies owners representing at least 75% of the mineral estate. For the purposes of the ordinance, notification should be made to the fee mineral owner and to any oil and gas lessees whose interest is shown of record. It has been suggested to the committee that the 2.5 acre threshold be implemented as a matter of policy rather than codified in the ordinance, so that it will not be necessary to amend the ordinance if it is determined that a somewhat larger threshold would prove sufficient to meet the needs of the ordinance while avoiding unnecessary work by staff.

C. Require that anyone seeking to submit for approval a development plat, preliminary subdivision plat or a voluntary annexation request for lands within an eighty acre section survey subdivision within which there is not already a drillsite approved under the city process show that a drillsite location within such eighty acres has been agreed to by the mineral and surface owners under such eighty acres, or if such agreement has not been obtained, confer with City Staff to designate a drillsite location which is a legal location under the rules of the Railroad Commission of Texas, which provides to the mineral owner reasonable access to his minerals, and, if the owner of the surface of the drillsite location is different from the applicant, that the proposed location is acceptable to such owner of the surface of the drillsite location. City Staff, the Oil and Gas Subcommittee, and the Planning and Zoning Commission should review the preliminary plat, development plat, or annexation request to determine whether it is sufficient to reasonably accommodate oil and gas and surface development uses, the City's Comprehensive Plan 2025, and the health, welfare, and safety of

the public, and if the Commission determines that the plat is sufficient, then the plat should be forwarded to the City Council for consideration and approval. If the parties are unable to agree, then the party seeking to develop should work with city staff to locate a drillsite within the eighty acre subdivision which reasonably affords the opportunity to the mineral owner to develop his minerals. The Oil and Gas Subcommittee and the Planning and Zoning Commission should review the development plat and determine whether it is sufficient to reasonably accommodate both oil and gas and surface development uses, and if the Commission determines that the plat is sufficient, then that portion of the oil and gas permit requirements should be deemed complete and the application should be forwarded to the City Council for consideration and approval.

D. Require that the applicant for an oil and gas drilling permit within the city limits or within the first one-half mile of the city's extraterritorial jurisdiction submit a development plat showing the location of its proposed drillsite and associated access roads, flowlines, and other lease facilities, and indicating how the facilities will be located in coordination with the City's Comprehensive Plan 2025. If the mineral owner and the surface owner have reached agreement with respect to the drillsite location(s), then the plat should depict the location of the drillsite(s) and related facilities within any existing real estate development plans if such plans exist. If the mineral owner and the surface owner have not reached agreement with respect to drillsite location(s), then the mineral owner should be required to work with city staff to designate a location which is a legal location under the rules of the Railroad Commission of Texas and which does not unreasonably interfere with the ability of the surface owner to develop his property. The Oil and Gas Subcommittee and the Planning and Zoning Commission should review the development plat and determine whether it is sufficient to reasonably accommodate oil and gas and surface development uses, the City's Comprehensive Plan 2025, and the health, welfare and safety of the public, and if the Commission determines that the plat is sufficient, then that portion of the oil and gas permit requirements should be deemed complete and the application should be forwarded to the City Council for consideration and approval.

E. Provide authority to the City, in the absence of agreement to the contrary, to impose drillsite locations on a proposed surface development plat, or to determine the optimal eighty acre drillsite location for land that is not yet platted, consistent with the City's long range plan.

8. The City Council should, by policy, appoint a three member Oil and Gas Subcommittee to the Planning and Zoning Commission, made up of petroleum engineers who should be,

if possible, licensed professional engineers (the Oil and Gas Subcommittee"), to review oil and gas permit applications to determine whether they meet the requirements of the City's oil and gas drilling ordinance, to impose requirements consistent with the City's drilling ordinance, to ensure that the permit requirements are sufficient to protect public health, welfare, and safety, and to review variance requests. It should then forward to the Planning and Zoning Commission a completed permit application along with its recommendation for approval, or a variance request with a recommendation to approve or disapprove the variance. The Subcommittee should also review preliminary subdivision plats, development plats (for both surface and mineral development) and annexation requests to ensure that they comply with applicable City requirements.

9. Some technical aspects of the City's ordinance are overly specific, and do not appear to be reasonably related to health and safety. In conjunction with Finding 8 above, the ordinance should be revised to provide more generally that specific technical requirements with respect to a particular oil and gas well permit application should be those deemed necessary by the Oil and Gas Subcommittee to protect the health and safety of the public. Those requirements, depending upon the circumstances of a particular permit application, might be either more or less stringent than those set out in the existing ordinance.

10. In particular, we have concerns about the following provisions:

    A. Paragraph G relates to the distinction between a Level One and a Level Two permit, based upon the distance of the proposed well from "…any occupied residence, occupied commercial structure, public building, public athletic field, property line of any property owned by a public entity, or any publicly dedicated right of way." It is the feeling of the task force that differentiation between those permits which require a public hearing and those which do not should be based upon potential health and safety issues rather than proximity to specific types of property. We believe that the nexus should be to occupied structures and perhaps public parks or athletic fields. It is our further feeling that proximity to public roads should be encouraged rather than discouraged in appropriate circumstances. For example, the current Wolfberry activity does not involve drilling overpressured zones, does not involve the possibility of H2S exposure, and should therefore be located near to public roads so as to minimize impact on the interior of neighborhoods. It is the Task Force's sense that Level One permits should apply to wells more than 1320 feet from an occupied structure and more than 660 feet from an athletic field or a publicly dedicated right of way, and that Level two permits should apply to permits for wells less than 1320 feet and more than 500 feet from an occupied structure or less than 660 feet and more than 330 feet from an athletic field or a publicly dedicated right of way.

    B. The current requirement for a supermajority of council votes for a Level two permit is a concern, because it presents the possibility that any two members of

the City Council could expose the City to substantial financial liability. If the City wishes to undertake such exposure, it should require a majority of the City Council to do so. Notification and voting requirements for approval of drilling permits should be the same as those required for surface development in the existing zoning ordinance.

C. Paragraph G.3., relating to the granting of a variance for a residence or building closer than 500 feet to a previously permitted oil and gas well should be revised. As written, it requires a public hearing and then provides discretion to the City Council as to whether to grant a variance. Presumably the applicant for such a permit would be aware of the proximity of the well, and if the applicant is willing to construct a building within that proximity he should be permitted to do so. The Task Force would eliminate the requirement for a public hearing and would limit the inquiry to a determination by the City's Oil and Gas Subcommittee that the granting of the permit would not present a health or safety risk to the applicant or subsequent occupants of the structure. In addition, the variance process should be available at the time of platting a subdivision so that a developer will be assured that the lots he develops will be available for sale. Any plat approved permitting the construction of structures within such proximity of an existing well should contain a notation to the effect that mortgage financing might be impacted by a lot's proximity to a producing well.

D. Paragraph H of the ordinance lists a number of criteria to be considered by the City Council in making the decision to grant a permit. Some of the criteria are sufficiently vague as to put the City Council in the position of making a purely subjective decision each time a permit application is considered. Subparagraph 1 is overly broad and subjective, and suggests different treatment depending upon the "value" of existing improvements. This puts the City Council in the position of approving permits based upon the economic circumstances of the surface occupants rather than issues relating to health, safety, and proposals to screen the well from existing occupants. Further, the reference to "adjoining property" is not sufficiently limited. "Adjoining property" could be many thousands of feet from the wellsite. Subparagraph 6 is overly broad and should be reworded to refer to an adverse effect on any other feature of the comprehensive master plan of the City of Midland, *which effect cannot be reasonably mitigated.*

E. Paragraphs I-N of the ordinance contains the components of the permit application and should be revisited. It is our feeling that a thorough review of these provisions should be undertaken with the Task Force, city staff and the Oil and Gas Subcommittee, and they should be revised to be consistent with the circumstances as they exist in this area. Some of the items which should be examined include paragraph 28, which requires "A list of all available alternative

locations from which the operator may reach the same mineral estate…" is overly broad, and probably impossible to comply with. The process should include consultation with the Oil and Gas Subcommittee to look at alternative locations, but not a requirement to "list" them. Subparagraph J.1.d requires a release of the City from all negligence or tort claims, and it seems problematic to require release of claims relating to intentional torts in order to access one's property. Subparagraph J.1.g. requires that upon assignment of a permit, an entirely new permit application must be filed. This process will produce unnecessary expense to both the operator and the City. The inquiry should be limited to the assignee's financial capability and its record with the City on existing permits. Subparagraph J.1.h. requires the applicant to execute a road repair agreement with the City. That requirement should only apply in situations where the applicant will be utilizing city streets. Subparagraph J.2 should include the option to pledge a bond or a Certificate of Deposit. Subparagraph J.3.e. requires well control insurance in all circumstances. This coverage is expensive and difficult to obtain, and should only be required in circumstances where the Oil and Gas Subcommittee deems it necessary. Many of the various requirements of Subparagraph K. should be within the discretion of the Oil and Gas Subcommittee and should be required based upon necessity under the circumstances. Paragraph K.31 should relate to safety rather than arbitrary distance. Fence requirements contained in Paragraph L. should be based upon circumstances. Fences in developed areas or in areas which are under development should be required to meet the standards and aesthetics of the development. Conversely, the permittee should be permitted to utilize seven foot chain link fencing, topped with three strands of barbed wire tilted away from the drillsite, in areas which are not developed, until development and final platting occurs on land adjacent to the drillsite. Subparagraph L.4.d. requires the Operator to drill a fresh water well for each permitted well in order to support landscape maintenance. The requirement should be changed to require that the Operator supply water for landscape, because the oil and gas owner does not own water rights as part of his oil and gas ownership, and does not have the right to drill for and produce water for irrigation purposes. Further, there are parts of Midland and surrounding areas that do not overlie fresh water zones. Deep burying of pits within the drillsite perimeter should be expressly permitted under the ordinance. In order to provide notice to the City or any future surface user of buried drilling pits, a provision should be added to the ordinance requiring the oil and gas developer to record a survey and description of the location of any closed pit which was utilized in connection with the drillsite.

11. A substantial portion of the cost of real estate development is incurred by the developer in bringing infrastructure, including roads, water, sanitary sewer and storm drainage to his project. Oil and gas development removes land required for drillsites from the surface developer's project, and so to the extent that it is consistent with state law, it would be equitable for the oil and gas developer to make a contribution to that

infrastructure, at least with respect to the infrastructure that it utilizes in its operations, based upon cost data maintained by the City.

12. To the extent that is permissible under state law, the City should adopt a development plat ordinance under V.T.C.A. Local Government Code Section 212.041 et seq to apply within the city limits and at least the first one-half mile of the City's extraterritorial jurisdiction. In the event that the ordinance and subdivision regulations are revised consistent with this recommendation, a six month grace period should be applied to proposed wells within the ETJ which have a valid Railroad Commission permit on the date that the ordinance is amended.

13. Enforcement of oil and gas drilling permits under the existing ordinance is the responsibility of code enforcement officers, who are not required to have the oil and gas industry expertise necessary to evaluate oil and gas operations and determine their compliance with permit requirements. Further, the code enforcement process can be lengthy and time consuming, and is not conducive to regulating activities such as oil and gas operations which could present dangers to the public if they are out of compliance with permit requirements. The task force heard concerns about the failure of some oil and gas operators to comply with permit requirements. It is our recommendation that the city hire a permit enforcement officer experienced in oil field operations to monitor compliance with permit requirements, and provide him with the authority he needs to require compliance with permit terms.